144

(2)

No. 09-274

IN THE

Supreme Court of the United States

CHARLES L. RYAN,
Director, Arizona Department of Corrections,

Petitioner,

v.

ROGER MARK SCOTT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JON M. SANDS
Federal Public Defender
MICHAEL L. BURKE*
JENNIFER Y. GARCIA
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816

* *Counsel of Record* *Counsel for Respondent*

226182

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Did the United States Court of Appeals for the Ninth Circuit properly apply well-established and uncontroversial principles of procedural default to the unique facts of this federal habeas corpus case?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
A. Scott's State Post-Conviction Proceeding	2
B. Scott's Petition for Review to the Arizona Supreme Court	3
C. The Federal District Court's Procedural Default Ruling	3
D. Scott's Appeal to the Ninth Circuit	4
Reasons for Denying the Petition	7
I. The state court did not clearly and expressly invoke a state procedural rule in denying Scott's motion to file an amended petition for post-conviction relief. Accordingly, even if Petitioner's arguments in favor of certiorari were not otherwise meritless, this court would nevertheless be required to uphold the Ninth Circuit's conclusion that a valid procedural default does not exist in this case	8

Contents

Page

II. Offering this court numerous disjointed and unpersuasive challenges to the Ninth Circuit's opinion, Petitioner asks this court to abandon decades of its procedural default jurisprudence in favor of a "reasonable notice" analysis that, even if workable in the abstract, has no relevance to the facts of this case 10

III. Petitioner improperly argues that an Arizona state procedural rule governing the filing of direct appeal briefs applies to petitions for review filed with an appellate court. In truth, these markedly distinct pleadings are governed by separate rules in the Arizona Rules of Criminal Procedure and petitioner has cited no authority, nor does any exist, to suggest that the rules governing direct appeal briefs in any way apply to petitions for review 15

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Doctor v. Walters, 96 F.3d 675 (3d Cir. 1996) ... 12

Gray v. Netherland, 518 U.S. 152 (1996) 11

Harris v. Reed, 489 U.S. 255 (1989) 4, 5, 8, 9

Insyxiengmay v. Morgan, 403 F.3d 657 (9th Cir. 2005) 6, 7, 15, 16

Kindler v. Horn, 542 F.3d 70 (3d Cir. 2008), *cert. granted, Beard v. Kindler*, 129 S. Ct. 2381 (2009) 12, 13, 14

Trest v. Cain, 522 U.S. 87 (1997) 11

STATE CASES

State v. Miller, 921 P.2d 1151 (Ariz. 1996) 16

State v. Rodriguez, 903 P.2d 639 (Ariz. Ct. App. 1995) 13

FEDERAL STATUTES

28 U.S.C. § 2254(d) 1, 10

Cited Authorities

Page

STATE PROCEDURAL RULES

Arizona Rule of Criminal Procedure 32.6(d) . . . *passim*

Arizona Rule of Criminal Procedure 31.13(c) . . . 16

STATEMENT OF THE CASE

In a unanimous, per curiam opinion (Kozinski, C.J., Farris and Bea, JJ.), the United States Court of Appeals for the Ninth Circuit, applying well-established and uncontroversial principles of procedural default in this 28 U.S.C. § 2254 habeas corpus proceeding, reversed the district court's conclusion that Respondent Roger Scott, an Arizona death-row prisoner, failed fairly to present various claims of ineffective assistance of counsel to the state courts. The appellate court's fact-specific opinion rests on its dual conclusions that (1) in denying Scott's motion to amend his state post-conviction petition pursuant to Rule 32.6(d) of the Arizona Rules of Criminal Procedure, the state post-conviction court apparently relied on a superseded version of Rule 32.6(d) to conclude that it lacked the authority to grant Scott's motion to amend; and (2) despite the state court's denial of the motion to amend, Scott nevertheless fully exhausted the claims in his proposed amended post-conviction petition when he attached that document to his petition for review to the Arizona Supreme Court.

Ignoring critical facts that underlie and inform the Ninth Circuit's narrow per curiam opinion, Petitioner attempts to portray this case as one of broad import. In doing so, Petitioner disregards central aspects of the Ninth Circuit's procedural default ruling and continues to rely on a wholly inapposite state procedural rule to support his argument that Scott failed to exhaust certain claims because he did not include them in the "body" of his petition for review to the Arizona Supreme Court following the denial of his petition for post-

conviction relief. The flaws in Petitioner's arguments become apparent when viewed in light of the actual facts presented to the Ninth Circuit.

A. Scott's State Post-Conviction Proceeding

Scott's court-appointed state post-conviction attorney, Neal Bassett, filed a single-issue petition on Scott's behalf. (Petitioner's Appendix ("Pet. App.") A at 6.) In response to what he accurately perceived to be Bassett's deficient performance, Scott wrote the state court several letters requesting that Bassett be replaced with new counsel. (Pet. App. A at 6.) The state court ignored Scott's repeated requests for competent counsel and ultimately denied the single-issue post-conviction petition. (Pet. App. A at 6-7.) Only when Bassett moved to withdraw as counsel did the state court take action on Scott's requests for a new attorney. (Pet. App. A at 7.) Rachel Yosha assumed Scott's representation and, in short order, moved to vacate the court's denial of post-conviction relief and sought leave to file an amended post-conviction petition raising twenty-three additional claims for relief. (Pet. App. A at 7.) The state post-conviction court denied the motions, however, because it did not believe it had authority under the Arizona Rules of Criminal Procedure to grant them. (*See* Pet. App. D at 2.) Specifically, the court reasoned that, although it was "authorized, upon a showing of good cause, to permit a defendant to amend a petition for post-conviction relief before a dispositive order issues," it did not believe that it had the authority

to vacate its prior order denying post-conviction relief. (Pet. App. D at 2.)[1]

B. Scott's Petition for Review to the Arizona Supreme Court

Yosha next filed a timely petition for review on Scott's behalf with the Arizona Supreme Court challenging both the lower court's denial of the initial, one-claim petition for post-conviction relief and the court's subsequent order denying his motions to vacate that denial and to permit him to file an amended petition. (Pet. App. A at 8.) Accompanying the petition for review was an appendix containing numerous documents in support of Yosha's arguments, including a copy of the proposed amended petition raising the additional twenty-three claims. (Pet. App. A at 8.) The Arizona Supreme Court denied the petition for review without comment. (Pet. App. B.)

C. The Federal District Court's Procedural Default Ruling

In Scott's subsequent federal habeas proceedings, the district court concluded that the claims alleged in

---

[1] Petitioner's Appendix D omits a typeface emphasis that appeared in the state post-conviction court's order denying Scott's motions. Specifically, the state court order reads: "By way of explanation, there is little doubt that this Court is authorized, upon a showing of good cause, to permit a defendant to amend a petition for post-conviction relief **before** a dispositive order issues. *See* Rule 32.6(d), A.R.Crim.P." (Emphasis in original). (*See also* Pet. App. A at 11 (quoting the state court ruling).)

the proposed amended post-conviction petition were procedurally defaulted. The court observed that "[a]though [Scott] attempted to raise [the] allegations in an amended PCR, the state court found that an amended PCR could not be properly filed under Ariz. R. Crim. P. 32." (Pet. App. E at 17.) The district court then cursorily concluded that "[t]he Rule 32 court's preclusion ruling, which is based upon Rule 32, Ariz. R. Crim. P., is a state procedural ruling that is regularly and consistently followed in Arizona and therefore constitutes an adequate and independent ground upon which a procedural default can be found."[2] (Pet. App. E at 17-18.) The district court also concluded that Scott failed to raise the claims in a "procedurally appropriate manner to the state's highest court." (Pet. App. E at 17.)

D. Scott's Appeal to the Ninth Circuit

Scott argued on appeal that the district court erred in its procedural default analysis. Specifically, citing *Harris v. Reed*, 489 U.S. 255, 263 (1989), he maintained that the state post-conviction court did not clearly and

---

[2] The district court cited "Ariz. R. Crim. P. 32" as "a state procedural ruling that is regularly and consistently followed and [which] therefore constitutes an adequate and independent ground upon which procedural default can be found." (Pet. App. E at 18.) Rule 32, however, is in fact nine separate rules (Rules 32.1 through 32.9), none of which clearly apply to the situation with which the state court was confronted in this case. Scott asked the trial court to vacate its order denying him post-conviction relief so as to permit him to file an amended petition. Scott's request was not directly governed by any of the nine rules that comprise "Rule 32."

expressly cite any established and strictly enforced state procedural rule precluding the relief he sought. Scott noted that the state court had instead acknowledged that, although it had the authority to permit a defendant to amend a post-conviction petition for good cause, it did not believe that it had the authority to vacate its prior order denying Scott post-conviction relief. (*See* Pet. App. D at 2.) Thus, Scott argued, the state court's ruling denying his motion to vacate was not premised on Scott's failure to comply with an established and strictly enforced procedural rule. Instead, the court denied the motion to vacate because it did not believe that it had the "*authority to grant the requested relief.*" (Pet. App. D at 2 (emphasis added).) Specifically, it did not believe that it had the authority to vacate its prior order to permit the filing of an amended petition. Such a ruling, Scott argued, could not provide the basis for a finding of procedural default under *Harris*. In other words, the state court's mistaken belief that it lacked the inherent authority to vacate one of its own orders was not a ruling based on state procedural bar.

Scott next argued that even if, in rejecting his attempt to file an amended petition for post-conviction relief, the state court had clearly and expressly stated that it was relying on an established and strictly enforced state procedural rule that prohibited a court from vacating an order denying post-conviction relief to permit the defendant to file an amended petition, that "rule" could not serve as the basis for procedural default because, to the extent that such a rule exists, Arizona does not consistently and regularly apply it. In support of this argument, Scott offered examples from other Arizona capital cases affording defendants precisely the

relief he had requested—withdrawal of an order denying post-conviction relief and permission to file an amended petition.

Concerning exhaustion of his claims before the state's highest court, Scott argued that, pursuant to the Ninth Circuit's ruling in *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005), attaching his rejected proposed amended petition for post-conviction to his petition for review was sufficient to exhaust the claims he had unsuccessfully attempted to raise in his amended petition.

The Ninth Circuit agreed with Scott, holding that "the State has not met its burden to prove the rule cited and relied upon by the Arizona post-conviction court—Arizona Rule of Criminal Procedure 32.6(d)—was clear, consistently applied, and well-established at the time the post-conviction court applied it to Scott's case." (Pet. App. A at 11.) In particular, the appellate court found that the state court had apparently relied on a superseded version of Rule 32.6(d), which permitted amendments to post-conviction pleadings only "prior to entry of judgment." (Pet. App. A at 11-12.) The court further observed that, contrary to what would have been required under the language of the correct version of Rule 32.6(d), "[t]he post-conviction relief judge conducted no analysis as to whether Scott had shown good cause to amend his petition." (Pet. App. A at 12.) Instead, the post-conviction court apparently believed—erroneously—that it was absolutely barred from permitting Scott to amend his petition because the request was not made, as was required under the superseded rule, prior to entry of judgment. (Pet. App. A at 11-12.)

The Ninth Circuit further concluded that Scott exhausted the ineffective-assistance-of-counsel claims raised in his proposed amended post-conviction petition when he attached that petition as an appendix to his petition for review to the Arizona Supreme Court. (Pet. App. A at 14-17.) In this regard, the court found this case to be indistinguishable from its earlier decision in *Insyxiengmay*.

REASONS FOR DENYING THE PETITION

The Ninth Circuit easily and correctly rejected Petitioner's "fair presentment" and "exhaustion" arguments by applying fundamental rules of procedural default. Nothing about the court of appeals' per curiam opinión satisfies this Court's exacting standards for granting petitions for writs of certiorari.

I.

THE STATE COURT DID NOT CLEARLY AND EXPRESSLY INVOKE A STATE PROCEDURAL RULE IN DENYING SCOTT'S MOTION TO FILE AN AMENDED PETITION FOR POST-CONVICTION RELIEF. ACCORDINGLY, EVEN IF PETITIONER'S ARGUMENTS IN FAVOR OF CERTIORARI WERE NOT OTHERWISE MERITLESS, THIS COURT WOULD NEVERTHELESS BE REQUIRED TO UPHOLD THE NINTH CIRCUIT'S CONCLUSION THAT A VALID PROCEDURAL DEFAULT DOES NOT EXIST IN THIS CASE.

In *Harris v. Reed*, 489 U.S. at 263, this Court acknowledged that "unless the state court clearly expressed its reliance on an adequate and independent state-law ground, this Court may address a federal issue considered by the state court." In his petition for certiorari, however, Petitioner focuses on whether Rule 32.6(d) of the Arizona Rules of Criminal Procedure is "adequate" to support the state court's ruling, without first considering whether the state court clearly and expressly invoked that rule. (Petition for Writ of Certiorari ("Pet. Cert.") at 9-10.)

As Petitioner acknowledges, "The state rule at issue here is straight-forward and understandable." (Pet. Cert. at 10.) It states:

> After the filing of a post-conviction relief petition, no amendments shall be permitted except by leave of court upon a showing of good cause.

Ariz. R. Crim. P. 32.6(d) (1996). As Scott argued in his briefs to the Ninth Circuit, however, the state court did not clearly and expressly invoke this rule. Indeed, as the Ninth Circuit noted, "it appears the judge relied on an earlier version of Rule 32.6(d), which prohibited a post-conviction court from allowing the filing of an amended petition after the first petition had been dismissed." (Pet. App. A at 12.) "The post-conviction relief judge conducted no analysis as to whether Scott had shown good cause to amend his petition." (Pet. App. A at 12.)

Even a cursory review of the post-conviction court's order reveals that the court denied Scott's motion to amend not because Scott failed to demonstrate good cause, which would have been the only basis for denying the motion under Rule 32.6(d), but because it did not believe it had the inherent authority to withdraw its prior ruling denying Scott relief on the one-issue petition that had been filed by Scott's first post-conviction attorney. (Pet. App. D at 2.) This pronouncement did not constitute "clearly expressed . . . reliance" on a state procedural rule. *Harris*, 489 U.S. at 263. Thus, even if this Court were to accept Petitioner's argument that the Ninth Circuit erred in its analysis of whether Rule 32.6(d) was "adequate" for procedural default purposes, the Court still could not find a valid procedural default in this case because the state court failed to clearly and expressly invoke a state procedural rule to support its holding. (*See* Pet. App. D at 2.)

II.

OFFERING THIS COURT NUMEROUS DISJOINTED AND UNPERSUASIVE CHALLENGES TO THE NINTH CIRCUIT'S OPINION, PETITIONER ASKS THIS COURT TO ABANDON DECADES OF ITS PROCEDURAL DEFAULT JURISPRUDENCE IN FAVOR OF A "REASONABLE NOTICE" ANALYSIS THAT, EVEN IF WORKABLE IN THE ABSTRACT, HAS NO RELEVANCE TO THE FACTS OF THIS CASE.

The precise nature of Petitioner's challenge to the Ninth Circuit's ruling is not easily discernible. On pages 9 through 21 of his certiorari petition, Petitioner lays out a series of seemingly unrelated objections to the appellate court's ruling. First, he appears to suggest that the appellate court's ruling violates the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") because it fails to afford adequate deference to the state court's holding. (*See* Pet. Cert. at 9-10 (alleging that "[t]he Ninth Circuit's determination that the state courts misinterpreted the state procedural rule at issue is contrary to the provisions of the AEDPA," and citing 28 U.S.C. § 2254(d).) As this Court is well aware, however, by the statute's own language section 2254(d) applies only to claims that were "adjudicated on the *merits* in State court proceedings" (emphasis added), and does not extend to the federal question of procedural default.

Next, Petitioner argues that the state post-conviction court merely "construed" Rule 32.6(d) of the Arizona Rules of Criminal Procedure "to be inapplicable

in Scott's case," and that the Ninth Circuit "lacked jurisdiction to question the state court's interpretation of the state procedural rule." (Pet. Cert. at 10-11 & n.2.) This argument, however, misconstrues the nature of the federal court's role in addressing questions of procedural default. The Ninth Circuit was not rejecting the state court's "interpretation" of Rule 32.6(d),[3] but was instead making the independent and purely federal determination of whether the state court had clearly and expressly invoked a consistently applied and well-established state rule. (*See* Pet. App. A at 10.) After its independent review of the state court's cryptic order (Pet. App. B), the Ninth Circuit concluded that Petitioner had failed to meet his burden of showing that the state court clearly invoked an adequate and independent state court rule. Nothing about the Ninth Circuit's application of these long-recognized principles of procedural default warrants this Court's review.

In yet another section of his petition, Petitioner challenges as "unfair" and "inconsistent with the AEDPA and this Court's jurisprudence" the requirement applied by the Ninth Circuit in this case that the state prove the affirmative defense of procedural default. (Pet. Cert. at 15.) Given, however, that in several cases, including *Gray v. Netherland*, 518 U.S. 152, 165-66 (1996), and *Trest v. Cain*, 522 U.S. 87, 89 (1997), this Court has recognized that procedural default is an affirmative defense that must be established by the state, it is unclear how such a rule is "inconsistent

---

[3] And, as the Ninth Circuit observed, considerable evidence exists to suggest that the state court was "interpreting" a superseded version of the state rule.

with . . . this Court's jurisprudence." Petitioner offers the Court no elucidation on how this might be so.

Finally, Petitioner argues that this case "presents the Court with an opportunity to identify the proper inquiry to be conducted in determining adequacy" of a state procedural rule. (Pet. Cert. at 12.) Petitioner is misguided, however, in his attempt to link this case with *Kindler v. Horn*, 542 F.3d 70 (3d Cir. 2008), *cert. granted*, *Beard v. Kindler*, 129 S. Ct. 2381 (2009), based on his inaccurate characterization that both cases involve discretionary application of state procedural rules. In *Kindler*, the Third Circuit stated that its analysis of the petitioner's procedural default was controlled by its analysis in an earlier case, *Doctor v. Walters*, 96 F.3d 675, 684 (3d Cir. 1996). *Kindler*, 542 F.3d at 79. In *Doctor*, the court held that the Commonwealth's fugitive-forfeiture rule was not firmly established, and therefore did not constitute an adequate and independent procedural rule. *Doctor*, 96 F.3d at 686. The court's analysis in *Doctor*, however, was based not upon the fact that the fugitive-forfeiture rule was discretionary, but upon the fact that the appellate court "believed it *lacked* the discretion to consider the appeal of a defendant who had fled at any time." *Id.* at 684 (emphasis added). This was not the case under Pennsylvania law as it existed at the time, however. The court *did* in fact have discretion to consider the appeal had it decided to do so. *Id.* at 685-86. It was this discrepancy that the court in *Doctor* relied upon in finding that the fugitive-forfeiture rule was not firmly established. *Id.* at 686. In *Kindler*, the court did not address this crucial aspect of *Doctor*,[4] and

[4] It is not clear from the *Kindler* opinion whether this argument was even raised by the Commonwealth in that case.

instead focused on the Commonwealth's attempts to distinguish that case from *Kindler* based upon the time at which the appellant became a fugitive. 542 F.3d at 79-80.

As in *Doctor*, Scott's case presented the appellate court with a situation in which the state court misinterpreted the controlling rule and believed that it had no discretion to grant the requested relief. (Pet. App. A at 12.) Scott's case actually has nothing to do with a state court's exercise of discretion, because the post-conviction court did not exercise any discretion in denying Scott's motion to amend his petition due to its mistaken belief that it had none. The Ninth Circuit did not find that Arizona Rule of Criminal Procedure 36.2(d) was not an adequate and independent state bar to consideration of Scott's claims because the rule was discretionary; rather, the court's adequacy analysis centered on the inconsistent application of the rule, stressing the fact that at the time of Scott's post-conviction proceedings, the only state court opinion interpreting the applicable rule reached the opposite result from the court in Scott's case. (Pet. App. A. at 12-13 (citing *State v. Rodriguez*, 903 P.2d 639, 640-41 (Ariz. Ct. App. 1995)).) Petitioner's argument that this case is linked to *Kindler* because both involve discretionary rules is entirely unsupported by the facts of this case.

Further, although Petitioner attempts to re-characterize the question presented in this case as one of "reasonable notice" (Pet. Cert. at 20), that argument is likewise unavailing. As previously discussed at length (*see, e.g.*, Pet. App. A at 11-14), the resolution in Scott's case turns on the unique fact that the state

court applied the wrong law in determining whether it could allow Scott to amend his post-conviction petition. Petitioner makes no attempt to explain how Scott could have been "on notice" that this legal error would occur. If anything, he could only have been "on notice" that the state court would perform the good-cause analysis required by the correct version of the rule in deciding whether to permit amendment. That analysis never occurred because the superseded version of the rule upon which the state court relied had no provision for a good-cause determination. (Pet. App. A. at 12.) Accordingly, Petitioner's endorsement of the "notice" approach to procedural default outlined in the Commonwealth's petition for certiorari in *Kindler* has no relevance to the case at issue here.

III.

PETITIONER IMPROPERLY ARGUES THAT AN ARIZONA STATE PROCEDURAL RULE GOVERNING THE FILING OF DIRECT APPEAL BRIEFS APPLIES TO PETITIONS FOR REVIEW FILED WITH AN APPELLATE COURT. IN TRUTH, THESE MARKEDLY DISTINCT PLEADINGS ARE GOVERNED BY SEPARATE RULES IN THE ARIZONA RULES OF CRIMINAL PROCEDURE AND PETITIONER HAS CITED NO AUTHORITY, NOR DOES ANY EXIST, TO SUGGEST THAT THE RULES GOVERNING DIRECT APPEAL BRIEFS IN ANY WAY APPLY TO PETITIONS FOR REVIEW.

In a cavalier mischaracterization of Arizona law, Petitioner maintains that, in holding that Scott exhausted his claims of ineffective assistance of counsel, "the Ninth Circuit panel refused to give effect to Arizona's procedural law requiring that all claims must be raised and argued in the body of a brief." (Pet. Cert. at 26.) Specifically, Petitioner maintains that Scott failed to exhaust his ineffective-assistance-of-counsel claims because he did not include them in the "body" of his petition for review to the Arizona Supreme Court following the denial of his petition for post-conviction relief.

Petitioner presented this legally unsound argument to the Ninth Circuit, which rejected it without comment when it held that the procedural posture of Scott's case was "indistinguishable" from its earlier decision in *Insyxiengmay v. Morgan*, 403 F.3d at 667-69, in which the court held that, by attaching as an appendix to a petition for review to the Washington Supreme Court

a pleading the post-conviction petitioner had unsuccessfully attempted to file in a lower state court, the petitioner had fully exhausted claims set forth in the attached pleading. In his pleading to this Court, however, Petitioner ignores the Ninth Circuit's reliance on *Insyxiengmay*, choosing instead to charge the Ninth Circuit with a "vitiation of the Arizona Supreme Court's rule requiring that claims be raised in the body of a brief." (Pet. Cert. at 27-28.)

The "rule" to which Petitioner refers, yet conspicuously fails to cite, is Rule 31.13(c) of the Arizona Rules of Criminal Procedure, a rule that governs the contents of appellate briefs *in direct appeals* and which, as interpreted by the Arizona Supreme Court, requires arguments to appear in the "body" of the appellate brief. *See, e.g., State v. Miller*, 921 P.2d 1151, 1160 (Ariz. 1996). Not surprisingly, the petition for certiorari cites only direct appeal decisions, all of which cite directly, or via citation to other cases, Rule 31.13(c).

Rule 31.13(c)'s requirement that all claims be raised in the body of a direct appeal brief is understandable in light of the fact that, in a capital case, a defendant's opening brief may be up to eighty pages in length. *See* Ariz. R. Crim. P. 31.13(f)(2) (1997 & 2009). In stark contrast, however, the Arizona Rules of Criminal Procedure limit a petition for review from the denial of post-conviction relief to twenty pages. *See* Ariz. R. Crim. P. 32.9(c)(1) (1997 & 2009).[5] In addition, Rule 32.9(c)(1)(iv)

---

[5] Scott, through his second post-conviction counsel, Rachel Yosha, moved the state court for an order permitting him to file a forty-eight-page petition for review. The state vigorously—and successfully—opposed the motion to exceed the twenty-

(Cont'd)

provides that, in petitions for review in capital cases, "all references to the record in the trial court shall be supported by an appendix, with appropriate copies of the portions of the record which support the petition." Given that this state procedural rule mandates an appendix for petitions for review in capital post-conviction proceedings, it is reasonable to assume that the Arizona Supreme Court in fact reviews the appendix once it is filed. Consistent with Rule 32.9(c)(1)(iv), Scott provided the Arizona Supreme Court with an extensive appendix in support of his petition for review. That appendix included his Motion for Extension of Time and Leave to File a Motion for Rehearing *Nunc Pro Tunc* and Amended Petition for Post-conviction Relief, in which he set forth, among numerous other claims, the ineffective-assistance-of-counsel claims Petitioner now argues were not exhausted. Understandably, of course, Scott did not argue the *merits* of his ineffective-assistance-of-counsel claims in the body of his petition for review because the superior court had denied his request to file the amended petition in which those claims were raised. The issue before the Arizona Supreme Court was the lower court's error in denying Scott's request to file the amended petition, not the merits of the claims raised in that amended petition.

Issue II of Petitioner's petition for certiorari is a chimera. The Ninth Circuit did not disregard, much less

---

(Cont'd)
page limit, and Scott subsequently filed a petition for review in compliance with Rule 32.9(c)(1). Scott devoted approximately one-half of that petition to the state post-conviction court's denial of his motion to file an amended petition.

"vitiate," any relevant Arizona procedural rules in concluding that Scott exhausted his claims of ineffective assistance of counsel. There is no meaningful dispute about the appropriateness of the Ninth Circuit's exhaustion ruling, let alone one that would warrant this Court's intervention.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JON M. SANDS
Federal Public Defender
MICHAEL L. BURKE*
JENNIFER Y. GARCIA
OFFICE OF THE FEDERAL
PUBLIC DEFENDER FOR THE
DISTRICT OF ARIZONA
850 West Adams Street, Suite 201
Phoenix, Arizona 85007
(602) 382-2816

Counsel for Respondent

* *Counsel of Record*